Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

DONNA FLEISCHLI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the forfeiture of seized firearms and ammunition is barred by the 120 day limitation period in 18 U.S.C. § 924(d)(1) where the notice of seizure (which informed potential claimants that they could file a claim and cost bond) was received less than 120 days after seizure, but the judicial action was filed more than 120 days after seizure?

2) Whether, under the Commerce Clause power (Art. I, § 8, Cl. 3), as applied to 18 U.S.C. § 922(g)(1) (prohibiting possession of firearms and ammunition by felons), the United States must prove that possession of the seized firearms and ammunition substantially affected interstate commerce?

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of forfeiture was published at 376 F.3d 709 (7th Cir. 2004) and is printed in the Appendix ("App.") at App. 2a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of forfeiture on July 31, 2004. App. 3a. A timely filed Petition for Rehearing En Banc was denied on October 27, 2004. App. 1a. On January 21, 2005, Justice John Paul Stevens extended the time to file this petition until March 26, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISION

U.S. Const., Art. I, § 8, Cl. 3 states in part: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ."

STATUTE

18 U.S.C. § 924(d)(1) provides in pertinent part that any firearm or ammunition:

> involved in or used in any knowing violation of subsection . . . (g) . . . of section 922 . . . shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms . . . shall, so far as applicable, extend to seizure and forfeitures under the provisions of this chapter . . . . Any

> action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

On February 8, 2000, the United States filed a Forfeiture Complaint against: i) 75 firearms seized on August 11, 1998 from the home of Donna and Joseph Fleischli and, ii) five (5) firearms, two (2) boxes of ammunition, numerous firearms parts, and various explosives seized on August 11, 1998 from the business of Joseph Fleischli. Donna Fleischli timely filed a claim to all but ten (10) of the items and timely filed an answer to the complaint. The district court had jurisdiction pursuant to 28 U.S.C. § 1345 and § 1355.

In March, 2001, Donna Fleischli filed a motion for partial summary judgment on several grounds. First, as to the eighty (80) firearms and two (2) boxes of ammunition for which for which forfeiture was sought pursuant to 18 U.S.C. § 924(d), she contended that the forfeiture was barred by the 120 day limitation period in 18 U.S.C. § 924(d)(1). Second, as to thirteen (13) of the items for which forfeiture was sought pursuant to 18 U.S.C. § 844(c), she contended that the items did not meet the definition of "explosive" under 18 U.S.C. § 841(d). Third, as to seven (7) of the items for which forfeiture was sought pursuant to 18 U.S.C. § 844(c), she contended that the items were exempt from § 844(c). The district court denied the motion for partial summary judgment in an Opinion filed June 8, 2001.

On January 28, 2002, the parties filed a stipulation of facts with respect to ninety-nine (99) of the items. After extensive briefing, the district court filed an Order and Judgment on December 11, 2003 forfeiting 102 of the items; the remaining items were ordered not forfeited.

Donna Fleischli timely filed a notice of appeal of the district court's judgment as to Items 12-15 (a Kul ZK Pistole, two (2) White Hrdwre Co. Expert Rifles, and an Unknown bolt action rifle), 21 (an Unknown Geishert pistol), 55-56 (two (2) boxes of ammunition), 57 (Browning pistol), 58-129 (various firearms), and 131-132 (various firearms). The Court of Appeals affirmed the district court's judgment.

Statement of Facts

On August 11, 1998, agents of the Bureau of Alcohol, Tobacco, & Firearms ("ATF") seized 75 firearms (Items 57-129 and 131-132) from the home of Donna and Joseph Fleischli at 1119 South MacArthur, Springfield, Illinois. Item 57 was seized from Donna Fleischli's bedroom and Items 58-129 and 131-132 were seized from a vault in the basement of the home. ATF agents also seized five (5) firearms (Items 12-15 and 21), two (2) boxes of ammunition (Items 55-56), numerous firearms parts, and various explosives from the business of Joseph Fleischli at 1905 East Washington, Springfield, Illinois. Joseph Fleischli was a convicted felon.

By letter of September 24, 1998 to Joseph Fleischli, ATF notified Fleischli that the property seized was subject to forfeiture and that, if he wished to contest the forfeiture, he needed to file a claim and a cost bond by October 21, 1998. On October 16, 1998, Donna Fleischli filed a claim as to various

items of the seized property. By letter dated February 8, 1999, ATF notified that her that, while she had timely filed a claim, she had not filed a properly executed bond and had not specified which items of property she claimed; ATF allowed her 20 days from receipt of the letter to perfect her claim. On March 1, she timely filed a bond and list of items she claimed. By letter dated April 29, 1999, ATF informed her that the bond was incomplete. After she timely filed a corrected bond, ATF notified her, by letter of May 20, 1999, that the claim and cost bond had been approved and were being forwarded to the United States Attorney. The instant forfeiture proceeding was filed in the district court on February 8, 2000, almost eighteen (18) months after the seizure, almost sixteen (16) months after the claim was filed, and approximately nine (9) months after the cost bond was perfected.

This petition concerns only Items 12-15, 21, 55-129, and 131-132. Items 12-15 are firearms within the meaning of 18 U.S.C. § 922(g)(1) which were seized from Joseph Fleischli's private non-firearms-related business; Item 21 is a firearm within the meaning of 18 U.S.C. § 922(g)(1) which was also seized from Joseph Fleischli's business; Items 55-56 are two (2) boxes of ammunition also seized from Joseph Fleischli's premises; Item 57 is a firearm within the meaning of § 922(g)(1) which was seized from Donna Fleischli's bedroom in Donna and Joseph Fleischli's home; and Items 58-129 and 131-132 are various firearms within the meaning of § 922(g)(1) which were seized from a vault in the basement of Donna and Joseph Fleischli's home.

ARGUMENT

I.

THE FORFEITURE WAS BARRED BY THE 120 DAY LIMITATION PERIOD IN 18 U.S.C. § 924(d)(1)

1. The Forfeiture Complaint alleged that the forfeiture of the firearms and ammunition was based upon 18 U.S.C. § 924(d)(1) and 26 U.S.C. § 5872. § 924(d)(1) provides in pertinent part that any firearm of ammunition:

> involved in or used in any knowing violation of subsection . . . (g) . . . of section 922 . . . shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms . . . shall, so far as applicable, extend to seizure and forfeitures under the provisions of this chapter . . . .

§ 5872 (the applicable provision of the Internal Revenue Code of 1954) provides in pertinent part that any firearm[1] "involved in any violation of the provisions of this chapter shall be subject to seizure and forfeiture . . . ."

The Forfeiture Complaint further alleged, *inter alia*, that the firearms at issue herein were "involved in or used in knowing violation of . . . § 922(g)(1) (possession of a firearm by a felon) . . . ."

2. The last sentence of 18 U.S.C. § 924(d)(1) provides:

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[1] § 5872 does not authorize the forfeiture of ammunition.

> Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

The seizure occurred on August 11, 1998. The notice of seizure, in which Joseph Fleischli was informed that he could file a claim and cost bond, was sent September 24, 1998; the judicial forfeiture was filed on February 8, 2000.

In affirming the authority of the district court to entertain the forfeiture proceeding, the Court of Appeals concluded that:

> the time limitation in § 924(d)(1) merely requires the United States to initiate either an administrative forfeiture proceeding or a judicial forfeiture action within 120 days of seizure.

376 F.3d at 713.

The Court of Appeals reached its decision by first finding that the word "any" in § 924(d)(1) was ambiguous because it has more than one meaning in *Webster's Third New International Dictionary*. 376 F.3d at 712. The Court of Appeals stated that the "primary definition" is:

> "one or some indiscriminately of whatever kind" or "one or another." *Webster's Third New International Dictionary*. Thus, the last sentence of the § 924(d)(1) could mean either an administrative or judicial proceeding must be

commenced within 120 days.

376 F.3d at 712.

The Court of Appeals further stated that:

> a secondary definition of "any" is "all-used as a function word to indicate the maximum or whole of a number or quantity [as in] 'he needs all the help he can get.'" *Id.* Thus, the statute could mean that both judicial and administrative actions must be commenced within the 120-day period.

376 F.3d at 712.

The Court of Appeals concluded that "[t]hese possible interpretations tell us that the statute is ambiguous." *Id.* Based upon that perceived ambiguity, the Court of Appeals looked at what it characterized as "the policy favoring administrative proceedings" (376 F.3d at 713) and concluded that such policy required resolving the ambiguity in favor of the United States.

The Court of Appeals' decision is in direct conflict with this Court's decision in *United States v. Gonzales*, 520 U.S. 1 (1997), where this Court came to exactly the *opposite* conclusion to that of the Court of Appeals with respect to the definition of "any." In *Gonzales*, this Court construed the phrase "any other term of imprisonment" in § 924(c)(1), noting first:

> The question we face is whether the phrase "any other term of imprisonment" "means what it

> says, or whether it should be limited to some subset" of prison sentences, *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) — namely, only federal sentences.

520 U.S. at 4.

This Court concluded:

> Read naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind." Webster's Third New International Dictionary 97 (1976). Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to **all** "term[s] of imprisonment," including those imposed by state courts. Cf. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 358 (1994) (noting that statute referring to "any law enforcement officer" includes "federal, state, or local" officers); *Collector v. Hubbard*, 12 Wall. 1, 15 (1871) (stating "it is quite clear" that a statute prohibiting the filing of suit "in any court" "includes the State courts as well as the Federal courts," because "there is not a word in the [statute] tending to show that the words 'in any court' are not used in their ordinary sense").

520 U.S. at 4-5 (emphasis added).[2]

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[2] Although *Gonzales* utilized the same dictionary as the Court of Appeals here, *Gonzales* did not suggest, let alone conclude, that "any" was ambiguous.

Thus, this Court looked at the very same "primary definition" of "any" ("one or some indiscriminately of whatever kind") as the did the Court of Appeals here -- indeed in the very same dictionary (*Webster's Third New International Dictionary*) as did the Court of Appeals -- and concluded, directly contrary to the Court of Appeals, that "any" has "an expansive meaning" and must be read as "referring to 'all' . . . ."[3] Thus, whichever of the definitions noted by the Court of Appeals is applied, the "primary definition" ("one or some indiscriminately of whatever kind") or the "secondary definition" ("all-used as a function word to indicate the maximum or whole of a number or quantity," which the Court of Appeals acknowledged would require that the judicial action be initiated within the 120 day period), the word "any" means "all" or "without limit" or "every." Accordingly, § 924(d)(1) broadly bars every action or proceeding for the forfeiture of firearms or ammunition which is not brought within 120 days of seizure, which would include the initiation of judicial proceedings.

That this Court in *Gonzales* construed § 924(c)(1), not § 924(d)(1), is of no moment since it is the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning," *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) (internal quotation marks and citations omitted).

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[3] This Court reiterated its holding in *Gonzales* in *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131 (2002)("As we have explained, 'the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."' *United States v. Gonzales*, 520 U.S. 1, 5 (1997).").

3. Even if the Court of Appeals was correct that "any" was ambiguous, the forfeiture would still be barred since ambiguity in a forfeiture statute is to be resolved *against* the United States because "a forfeiture proceeding is quasi-criminal in character" (*Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965)) and "penal statutes are to be construed strictly." *F. C. C. v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954). *See also United States* v. *One 1936 Model Ford V-8*, 307 U.S. 219, 226 (1939)("[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law").

In contrast to the Court of Appeals here, the Ninth Circuit held that "forfeiture statutes are strictly construed against the United States." *United States* v. *$191,910 In U.S. Currency*, 16 F.3d 1051, 1068 (9th Cir. 1994). Similarly, the Fifth Circuit has held that "forfeiture is not favored, and statutes providing for forfeiture are strictly construed." *United States* v. *One 1977 Cadillac, Etc.*, 644 F.2d 500, 501 (5th Cir. 1981). The District of Columbia Circuit, in *American Maritime Association* v. *Blumenthal*, 590 F.2d 1156, 1165 (D.C. Cir. 1978), likewise held that it "is well understood that statutes imposing a forfeiture . . . are to be construed strictly." Thus, the Court of Appeals's decision, which resolved the purported ambiguity in favor of the United States, conflicts with the decisions of three other circuits.

The Court of Appeals resolution of the ambiguity is also in conflict with this Court's recent decision in *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004), where this Court unanimously held, regarding a criminal statute being applied in a civil context, that, if the statute was ambiguous, the Court "would be

constrained to interpret any ambiguity in the statute in petitioner's favor." 125 S.Ct. at 384, n.8. The Court explained:

> Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies. *Cf. United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 517-518 (1992) (plurality opinion) (applying the rule of lenity to a tax statute, in a civil setting, because the statute had criminal applications and thus had to be interpreted consistently with its criminal applications).

Id.

In not resolving the ambiguity in Petitioner's favor, the Court of Appeals decision conflicts with *Leocal*.

4. In addition to resolving the purported ambiguity for the wrong party, the Court of Appeals' reasoning is flawed. First, the Court of Appeals states the (undisputed) fact that § 924(d)(1) "expressly incorporates provisions of the Internal Revenue Code relating to forfeiture." 376 F.3d at 712. The Court of Appeals goes on to state, however, that "[o]ne such provision, 26 U.S.C. § 7327, incorporates a 5-year statute of limitations for bringing judicial forfeiture actions in cases under customs laws." *Id.* According to the Court of Appeals, this 5-year statute of limitations "has significant bearing on the meaning of judicial forfeitures under § 924(d)(1)." 376 F.3d at 713. In fact, § 7327 says nothing whatever concerning *judicial forfeiture* actions; rather, it incorporates only the "provisions of

law applicable to the remission or mitigation" of forfeitures.

This Court has recognized the distinction between a judicial forfeiture action and remission and mitigation. For example, *United States v. $8,850*, 461 U.S. 555, 566 (1983) stated that a petition for remission may "obviate the need for judicial proceedings." Accordingly, in concluding that § 7327 relates to judicial forfeiture actions, the Court of Appeals' decision conflicts with this Court's decision in *United States v. $8,850*.[4]

The Court of Appeals also states that, "if Congress wanted all proceedings to be subject to the 120-day time limitation, it could easily have indicated this by using the word 'all' instead of 'any' in the statute." 376 F.3d at 713. As demonstrated by this Court's holding in *United States v. Gonzales, supra*, Congress' choice of the word "any" rather than "all" was eminently reasonable to achieve the goal of subjecting all forfeiture proceedings to the 120-day time limitation.

Moreover, the distinction between "any" and "all" was

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[4] The Court of Appeals states that "[r]equiring the initiation of both administrative and judicial proceedings within 120 days would not further the policy favoring administrative proceedings." 376 F.3d at 713. The Court of Appeals cites *United States v. $8,850, supra*, as holding that "administrative proceedings are favored." *Id.* *United States v. $8,850* did not conclude, however, that administrative proceedings are favored; it held only that "delaying the initiation of forfeiture proceedings . . . can favor both the claimant and the United States." 461 U.S. at 566. Indeed, this Court added that a claimant has a "right to a prompt judicial hearing," even if he "seeks the additional remedy of an administrative petition for mitigation." *Id.*

not of significance to Congress since it intended that the words "action or proceeding" referred to a *judicial* action or proceeding, not to a preliminary administrative process which is merely a mechanism for determining whether anyone claims the seized property, for processing claims, and for disposing of the property if it is not claimed.[5] Indeed, the administrative

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[5] That preliminary process is set forth in 26 U.S.C. § 7325. Following the requirement for an appraisal, § 7325 states :

> (2) Notice of seizure. If such goods are found by such appraisers to be of the value of $ 100,000 or less, the Secretary shall **publish a notice** for 3 weeks, in some newspaper of the district where the seizure was made, describing the articles and stating the time, place, and cause of their seizure, and **requiring any person claiming them to appear and make such claim** within 30 days from the date of the first publication of such notice.
>
> (3) Execution of bond by claimant. Any person claiming the goods, wares, or merchandise so seized, within the time specified in the notice, may file with the Secretary a claim, stating his interest in the articles seized, and may execute a bond to the United States in the penal sum of $ 2,500, conditioned that, **in case of condemnation** of the articles so seized, the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon the delivery of such bond to the Secretary, he shall transmit the same, with the duplicate list or description of the goods seized, **to the United States attorney** for the district, and such attorney **shall proceed thereon** in the ordinary manner prescribed by law.
>
> (4) Sale in absence of bond **If no claim is interposed and no bond is given** within the time above specified, **the Secretary shall give reasonable notice of**

process expressly requires that, upon filing a claim (and a bond), the matter *must* be referred to the United States Attorney for the district to "proceed in the ordinary manner prescribed by law." 26 U.S.C. § 7325. The administrative process provides no hearing, does not decide disputed claims, and does not determine title to the property. *Cf. United States* v. *Stowell*, 133 U.S. 1, 17 (1890)(United States's "title is not perfected until judicial condemnation"). As such, the administrative process is not "an action or proceeding for . . . forfeiture" within the meaning of § 924(d)(1).

5. The meaning of the words "action or proceeding" is also evident from their context. As this Court has explained:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning--or ambiguity--of certain words or phrases may only become evident when placed in context. . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into an harmonious whole . . . ."

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the sale of the goods, wares, or merchandise by publication, and, at the time and place specified in the notice, shall, unless otherwise provided by law, sell the articles so seized at public auction, or upon competitive bids, in accordance with such regulations as may be prescribed by the Secretary. (emphasis added).

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)(citations omitted).

The following two consecutive sentences in § 924(d) make clear that Congress intended the words "action or proceeding" to refer to a *judicial* action or proceeding:

> (1) . . . **Any action or proceeding** for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.
>
> (2)(A) In **any action or proceeding** for the return of firearms or ammunition seized under the provisions of this chapter, *the court shall allow* the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor. (emphasis added.)

In paragraph (2)(A), "any action or proceeding" must refer to a *judicial* action or proceeding; otherwise, "the court" could not "allow" an attorney's fee to a successful claimant against the forfeiture. As paragraph (1) uses the identical phrase ("any action or proceeding"), it is evident that Congress intended the phrase to refer to a *judicial* action or proceeding.[6] To hold otherwise would violate the well-established rule of statutory construction that "identical words used in different

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[6] Justice Scalia has noted that an "action" or "proceeding" in "legal parlance (though not in more general usage) means a lawsuit." *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 619 (2001)(Scalia, J., concurring).

parts of the same act are intended to have the same meaning," *Sorenson v. Secretary of Treasury, supra.*

6. The Court of Appeals decision, to the extent it held that the word "action" referred to an administrative process, is in direct conflict with at least three other circuits. See *Cann* v. *Carpenters' Pension Trust Fund for N. Cal.*, 989 F.2d 313, 316 (9th Cir. 1993)("The word 'action' in its usual legal sense means 'a suit brought in a court; a formal complaint within the jurisdiction of a court of law'"); *TLI, Inc.* v. *United States*, 100 F.3d 424, 427 (5th Cir. 1996)(same); *Resolution Trust Corp.* v. *Love*, 36 F.3d 972, 976 (10th Cir. 1994)(same); *Peterson* v. *Cont'l Cas. Co.*, 282 F.3d 112, 119-20 (2d Cir. 2002)("Used in a statute, the term 'action' traditionally connotes a formal adversarial proceeding under the jurisdiction of a court of law").

These cases also point to the conclusion that "proceeding" also refers to a suit brought in a court because "a word is known by the company it keeps (the doctrine of *noscitur a sociis*)." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995).

7. That Congress intended "action or proceeding" to refer to a *judicial* action or proceeding is also evident from the forfeiture statutes incorporated by § 924(d)(1). In *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984), this Court stated:

> Section 924(d) does not prescribe the steps to be followed in effectuating a forfeiture, but rather incorporates by reference the procedures of the Internal Revenue Code of 1954 (Code),

> 26 U.S.C. §§ 7321-7328. The Code in turn provides that an action to enforce a forfeiture "shall be in the nature of a *proceeding* in rem in the United States District Court for the district where such seizure is made." 26 U.S.C. § 7323.

465 U.S. at 363 (emphasis added).

By incorporating § 7323, which uses the term "proceeding" to refer to the process used to forfeit property, Congress signaled its intention that "action or proceeding" referred to a *judicial* action or proceeding.

8. The legislative history of § 924(d) confirms that Congress intended the words "action or proceeding" to refer to a *judicial* action or proceeding. During the floor debate in the House on the Firearms Owners' Protection Act (which enacted § 924(d)(1)), the sponsor (Rep. Volkmer) criticized an alternative bill (the Hughes bill) because "it [did] not require an agency to bring **judicial** actions within 120 days, or any other limit, of a seizure." 132 Cong.Rec. H1652 (April 9, 1986)(emphasis added). As a "statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *FEA v. Algonquin Sng, Inc.*, 426 U.S. 548, 564 (1976). See also *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394-395 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt"). Indeed, given that the statement was uncontradicted, such was apparently the understanding of both the supporters and opponents of the bill. Thus, the sponsor's understanding should not only be accorded substantial weight, it should be viewed as conclusive.

The sponsor's statement was entirely consistent with the Report of the Senate Judiciary Committee in explaining the 120 day limit: "Beyond this point, the statutory authority for the United States to obtain forfeitures under Chapter 44 [of Title 18] is lost." Senate Report 98-583, 98th Cong., 2d Sess. (1984).

II.
THE COMMERCE CLAUSE POWER, AS APPLIED TO 18 U.S.C. § 922(g)(1), REQUIRED THE UNITED STATES TO PROVE THAT THE POSSESSION OF THE SEIZED FIREARMS AND AMMUNITION SUBSTANTIALLY AFFECTED INTERSTATE COMMERCE

1. Pursuant to 18 U.S.C. § 922(g)(1), a felon is prohibited from possessing "in or affecting commerce" any firearm or ammunition.[7] Accordingly, to forfeit a firearm or ammunition for a violation of § 922(g)(1), the United States must prove that it was possessed "in or affecting commerce . . . ." As the firearms and ammunition here were possessed in a home and in a non-firearms-related private business, they were plainly not possessed "in . . . commerce"; thus, to prove a violation of § 922(g)(1), the United States had to prove that

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[7] Sec. 102(6) of Pub. L. 99-308, 100 Stat. 449 (1986), amended § 922(g) by striking out "to ship or transport any firearm or ammunition in interstate or foreign commerce" and inserting in lieu thereof:

> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

they were possessed "affecting commerce . . . ."

2. In *Scarborough* v. *United States*, 431 U.S. 563 (1977), this Court addressed the jurisdictional nexus in 18 U.S.C. App. § 1202(a), which provided in part that a convicted felon could not possess "in commerce or affecting commerce" any firearm.[8] As the defendant had argued only that "the nexus must be 'contemporaneous' with the possession" (431 U.S. at 568), the limited question before the Court was whether:

> proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the *statutorily* required nexus between the possession of a firearm by a convicted felon and commerce.

431 U.S. at 564 (emphasis added).

This Court held that proof the possessed firearm previously traveled in interstate commerce was *statutorily* sufficient. 431 U.S. at 576 ("we see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce"). The Court did not, however, address whether such proof was *constitutionally* adequate.[9]

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[8] § 1202 was repealed by Sec. 104(b) of Pub. L. 99-308, 100 Stat. 449, 459 (1986).

[9] "It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered." *United States* v. *Mitchell*, 271 U.S. 9, 14 (1926).

In *United States* v. *Lopez*, 514 U.S. 549 (1995), the Court held that, for Congress to have power to regulate an intrastate activity under the Commerce Clause, the regulated activity must *substantially* affect interstate commerce:

> [O]ur case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. . . . We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.

514 U.S. at 559.

Further, *Lopez* noted that, where a firearm statute included a jurisdictional element, that element required a "case-by-case inquiry, that the firearm possession in question affects commerce." 514 U.S. at 561. Thus, because the Court's holding that the regulated activity must substantially affect (not merely affect) interstate commerce preceded this statement, the "case-by-case inquiry" which must be made is whether the particular firearm possession substantially affected interstate commerce; if it does not, it is beyond "Congress' power to regulate" under the Commerce Clause.

In the case at bar, no evidence of the effect on interstate commerce of the possession of each firearm and the ammunition was offered by the United States; rather, the only evidence in the record was that the firearms and ammunition were possessed in a home or a non-firearms-related private business.

Thus, the decision of the Court of Appeals affirming the forfeiture conflicts with this Court's application of the Commerce Clause.

The Court of Appeals' decision also conflicts with the decision of another court of appeals. In *United States* v. *Emerson*, 270 F.3d 203 (5th Cir. 2001), the Fifth Circuit noted:

> [T]he founding generation would have regarded as clearly illegitimate any construction of the Commerce Clause which allowed federal prohibition of mere passive, non-commercial, personal possession of a firearm acquired in accordance with federal (as well as state) law which thereafter always remained within the state in which it was acquired.

270 F.2d at 217, n.8.

3. The possession here was also outside Congress' Commerce Clause power because the activity was not commercial. *Jones* v. *United States*, 529 U.S. 848 (2000) held that 18 U.S.C. § 844(i)(prohibiting maliciously damaging or destroying, by means of fire, "any building . . . used . . . in any activity affecting interstate or foreign commerce") did not extend to an owner-occupied private residence not used for any commercial purpose. In reaching this conclusion, *Jones* noted that its construction of § 844(i) was "reinforced by the court's opinion in *United States* v. *Lopez* . . . ." 529 U.S. at 851. In *Lopez*, the Court had "stressed . . . that the legislation [invalidated by Lopez] aimed at activity in which 'neither the actors nor their conduct has a commercial character . . . .'" 529

U.S. at 858.[10]

Further, the week after deciding *Lopez*, the Court decided *United States* v. *Robertson*, 514 U.S. 669 (1995)(*per curiam*), referring to earlier cases as defining "the extent of Congress' power over purely *intra*state ***commercial*** activities that nonetheless have substantial *inter*state effects." (bold emphasis added). 514 U.S. at 671.

In *United States* v. *Morrison*, 529 U.S. 598 (2000), this Court stressed that only intrastate *economic* activity could be regulated under the Commerce Clause: "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is *economic* in nature." 529 U.S. at 613 (emphasis added). Indeed, the Court criticized the dissent for "downplay[ing] the role that the economic nature of regulated activity plays in our Commerce

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[10] *Lopez* also stated: "[W]e have upheld a wide variety of congressional Acts regulating intrastate ***economic*** activity where we have concluded that the activity substantially affected interstate commerce." (emphasis added) 514 U.S. at 559; "Where ***economic*** activity substantially affects interstate commerce, legislation regulating that activity will be sustained." (emphasis added) *Id.*; "Even *Wickard* [v. *Filburn*, 63 S.Ct. 82 (1942)] . . . involved ***economic*** activity . . . ." (emphasis added) *Id.*; Section 922(q) cannot "be sustained under our cases upholding regulation of activities that arise out of or are connected with a ***commercial transaction*** . . . ." (emphasis added) 514 U.S. at 560; "The possession of a gun in a local school zone is in no sense an ***economic*** activity . . . ." (emphasis added) 514 U.S. at 563. See also *Katzenbach* v. *McClung*, 379 U.S. 294 (1964)(local activity may "'be reached by Congress if it exerts a substantial ***economic*** effect on interstate commerce . . . .'")(emphasis added). Even the dissent in *Lopez* did not dispute that it was only intrastate *economic* activity which could be regulated under the Commerce Clause. 514 U.S. at 577.

Clause analysis." 529 U.S. at 610. The Court thus invalidated 42 U.S.C. § 13981 as "[g]ender-motivated crimes of violence are not, in any sense of the phrase, *economic* activity." 529 U.S. at 613 (emphasis added).

The activity here, possession of firearms and ammunition within the home and in a private non-firearms related business, is not, by any stretch, economic activity. Indeed, in *Scarborough*, this Court candidly noted that, in enacting the "affecting commerce" element of § 1202(a), "Congress was not particularly concerned with the impact on commerce . . . ." 431 U.S. at 578, n. 11. In enacting the current version of § 922(g), Congress was not at all concerned with the "affecting commerce" element. In Senate Report 98-583, 98th Cong., 2d Sess., the Senate Committee on the Judiciary noted "the affected subsections of 18 U.S.C. 922 would prohibit firearm and ammunition possession, receipt or transportation, *in commerce*, by convicted felons . . . ." S.Rep. 98-583 at 87 (emphasis added).

The Court of Appeals held that it was bound by its prior decision in *Gillespie* v. *City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999). 376 F.3d at 713. The reasoning of *Gillespie* was subsequently rejected by this Court in *Jones*, *supra* (unanimously reversing the Court of Appeals' decision in *United States* v. *Jones*, 178 F.3d 479 (7th Cir. 1999)) and *Morrison*, *supra*. The Court of Appeals' holding here thus conflicts with this Court's decisions in *Jones* and *Morrison*.

In *Gillespie*, the Court of Appeals relied on the aggregation of firearm possessions to conclude that there was a substantial effect on interstate commerce of possession by

felons. *Gillespie* at 705. In *Jones*, however, this Court rejected the aggregation principle. While not disagreeing that the "affecting commerce" element of § 844(i) required that residential arson substantially affect interstate commerce, this Court concluded that the Court of Appeals' determination of how commerce was substantially affected was improper. In particular, this Court rejected the Court of Appeals' holding that, although the interstate connections of a single residential building were "pretty slight" (178 F.3d at 480), residential arson, viewed collectively, substantially affected interstate commerce in that losses were "covered by interstate insurance markets" and "arsons also affected gas, electric, and telephone service . . . ." 178 F.3d at 481.

In reversing, this Court held:

> Were we to adopt the United States's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is . . . served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce.

529 U.S. at 857.

Similarly, in *Morrison*, this Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect

on interstate commerce." 529 U.S. at 617.[11]

Gillespie is also directly contrary to *Lopez*, *supra*, where this Court noted that, where a firearm statute included a jurisdictional element, that element required a "case-by-case inquiry, that the *firearm possession in question* affects commerce." 514 U.S. at 561 (emphasis added). Here, there was no evidence that possession of the 75 firearms in the home or of the 9 firearms seized from his non-firearms-related private business substantially affected interstate commerce. Thus, the decision of the Court of Appeals that the United States met the constitutionally imposed burden conflicts with *Lopez* and *Morrison*.[12]

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[11] *Morrison* also stated that, "in every case where we have sustained federal regulation under the aggregation principle in [Wickard], the regulated activity was of an apparent commercial character." 529 U.S. at 611 n. 4.

[12] The Court of Appeals also relied on, *inter alia*, on *United States* v. *Wesela*, 223 F.3d 656 (7th Cir. 2000), *cert. den.*, 531 U.S. 1174 (2001). 376 F.3d at 713. *Wesela*, however, did not address whether the United States had to prove that a defendant's possession of a firearm substantially affected interstate commerce; it held only that § 922(g)(1) was not *facially* unconstitutional because it included the "in or affecting commerce" element. 223 F.3d at 660.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

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